

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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75-1103

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1103

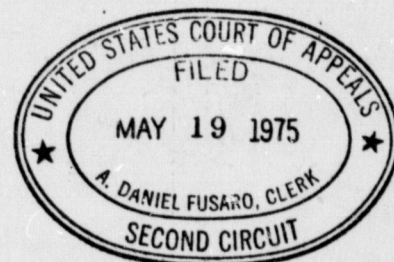
UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

V.

MARGARET SAMUEL

DEFENDANT-APPELLANT

BRIEF OF
DEFENDANT-APPELLANT
MARGARET SAMUEL



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OTHER AUTHORITIES

18 U.S.C. §1708

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken embezzled, or abstracted —

28 U.S.C. §1861

Declaration of Policy

It is the policy of the United States that all litigants in the Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district court of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. §1862

Discrimination Prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin or economic status.

28 U.S.C. §1863

Plan for Random Jury Selection

(a) Each United States district court shall devise and place into written operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title....

(b) (1)...

(b) (2) [Among other things, such plan shall...] specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title...

STATEMENT OF ISSUES

1. Assuming the following to be true, is it sufficient evidence to permit the jury to find beyond a reasonable doubt that welfare checks were stolen from the mail:

- Normal procedures within the Connecticut Department of Welfare would ordinarily guarantee that all welfare checks are mailed to the payees.
- The payees did not receive the checks in the mail.

2. Assuming the following to be true, is it sufficient evidence to permit the jury to find beyond a reasonable doubt that the defendant "possessed" the checks within the meaning of 18 U.S.C. Section 1708:

- The defendant's handwriting appeared on the back of each check.

3. Assuming the following to be true is it sufficient evidence to permit the jury to find beyond a reasonable doubt that the defendant possessed the checks knowing that those checks had been stolen:

- Her handwriting appeared on the back of each check;
- The checks were cashed on the same day as their date of issue.

4. Is it a violation of the defendant's right to due process of law under the Fifth Amendment to combine and compile inferences in such a way as to shift the burden from the Government and compel the defendant to prove her innocence

beyond a reasonable doubt?

5. Is it a violation of the defendant's Fifth Amendment right not to incriminate herself to permit the jury to draw an inference which can only be rebutted by the defendant conceding a central element of the offense?

6. Does the Jury Plan for the District of Connecticut violate Title 28, United States Code, Section 1861 and 1862?

STATEMENT OF THE CASE

On March 23, 1974, a Federal Grand Jury sitting in Bridgeport, Connecticut handed up a nine count indictment in which the appellant, Margaret Samuel, was charged with nine separate violations of Title 18, United States Code, Section 1708. (app. p. 4) Mrs. Samuel was said to have possessed nine different Connecticut State Welfare checks which had been stolen from the mail. The Government alleged further that Mrs. Samuel knew, at the time she is said to have had the checks in her possession, that they had been stolen.

On September 5, 1974, the defendant filed her Motion to Stay the Proceedings and to Strike the Jury Panel with attached affidavits. (app. p. 8) In that motion, the defendant requested the Court to enter a supplemental order directing that an alternative procedure for selecting petit jurors be employed. The Government filed its opposition to the defendant's motion on September 23, 1975, (app. p. 13) citing the Courts earlier ruling in United States v. Louis Gonzalez, et al (D. Conn. Crim. No. B-115 May 22, 1974) (app. p. 14)

On November 25, 1974, the defendant renewed her motion to strike the jury panel. The motion was denied by the Honorable Jon O. Newman, United States District Court Judge for the District of Connecticut and the jury was selected.

On December 3, 1974, the trial commenced before Judge Newman and the jury heard testimony from fourteen government witnesses.

On December 5, 1974, the jury heard summations of counsel and the Court gave its charge. The defendant took exceptions to two portions of Judge Newman's charge, the Court rejected the defendant's exceptions, and the jury retired. The jury subsequently returned with a verdict in which the defendant was found guilty on all nine counts.

On March 7, 1975, Judge Newman sentenced the defendant to imprisonment for one year, execution suspended after sixty days, with two years probation. The defendant filed her Notice of Appeal.

STATEMENT OF FACTS

The Government's case against Margaret Samuel consisted of the following evidence:

Daisy Langston testified that she did not receive her welfare check on November 1, 1972, (Government's Exhibit I) that she notified the Connecticut State Welfare Department of that fact and filed an affidavit with the Department to that effect;

Shirley Woods Coltrane testified that she did not receive her welfare checks for the months of October, November and December, 1972 (Government Exhibits 2, 6 & 7) that she notified the State Welfare Department of that fact, and filed an affidavit with the Department to that effect;

Doris Lindsay testified that she did not receive three welfare checks (Government Exhibits 3, 4 and 8), that she notified the State Welfare Department of that fact, and filed an affidavit with the Department to that effect;

Suzy Pettus Booker testified that she did not receive her welfare check for November, 1972, (Government Exhibit 5) that she notified the State Welfare Department and was told that her check had already been cashed.

Lindora Barnes testified that she did not receive her welfare check for the month of October, 1972, (Government Exhibit 9) that she notified the State Welfare Department of that fact, and filed an affidavit to that effect.

At the time these thefts allegedly occurred, the fall and winter of 1972-1973, all of the women lived in the same project (Beardsley Terrace Apartments) as did the defendant and were acquainted with the defendant. All of the women testified that they had not signed their checks (Government Exhibits 1-9) and had not authorized any one else to sign the checks. They all received their mail in boxes located in the lobby of their building but there was no evidence or testimony that the post boxes had been tampered with in any way.

Rose Morton a teller for the City National Bank in Bridgeport testified that she cashed Government Exhibit 1.

Theresa Judkins also a teller at the City National Bank testified that she cashed Government Exhibits 2,3,4,5,6, and 7. On cross examination, Judkins testified that she requested and received identification from the person cashing the check, and in most cases, driver's licenses were requested.

In addition, Morton and Judkins both testified that Government Exhibits 1-7 were cashed on the same date as their date of issue. Judkins testimony further reveals that she cashed four of the checks in question (Government Exhibits 4-7) on the same date, (December 1, 1972).

Charles Milton testified that, while employed as a salesman at a clothing firm called Mr. Jerry's Ltd. a man and a woman cashed Government Exhibit 8 in payment for a black mohair suit. He testified further that he saw the

woman sign the name Doris Lindsey on the check. Milton could not recall the date of the transaction in February.

Donald Benedetto testified that, as manager of Jerry's Ltd., he was responsible for depositing Government Exhibit 8 with the City National Bank in Bridgeport the day following ("most likely") the transaction in the store. He testified that the date stamped by the bank on the back of Government Exhibit 8 was February 20, 1972.

Alfred DelVecchio, Assistant Vice President of the Connecticut Bank and Trust in Bridgeport, testified that he obtained film from bank surveillance cameras for the period of time around 11:12 a.m. on October 2, 1972 and had prints made from the film. Those prints were entered into evidence (Government Exhibits 11-14)

Robert Romatzick, the teller-manager for Connecticut Bank and Trust in Bridgeport, testified that he cashed Government Exhibit 9 on October 2, 1972 and that he noted the date and time (11:12) the check has been cashed. He testified further that he requested and received identification from the individual who cashed the check and that the individual was asked to sign the check in front of him.

Edward Podhajski, the Chief of the Division of Money Disbursement for the Connecticut State Welfare Department, testified that he checked the Department's records and determined (1) that the payees of the checks in question were

in fact welfare recipients, during the fall and winter of 1972-1973; and (2) that those specific checks had been mailed through the United States mail to the payees.

Ronald B. Cesa, a Postal Inspector for the United States Postal Service, testified that he took handwriting exemplars and fingerprints from Margaret Samuel and submitted them to the government laboratory. He testified further that it was necessary for him to take a second set of fingerprints of Mrs. Samuel which was done at a later date at the Bridgeport Police Department. On cross examination, Inspector Cesa confirmed that he had written in his report dealing with the first set of fingerprints that the laboratory had been unable to come to a determination based on the prints that had been taken initially.

James E. Price, a document analyst employed by the United States Postal Service Crime Laboratory, testified that the defendant's left thumbprint as it appeared on the second set of prints taken from Margaret Samuel match a print found on the back of Government Exhibit No. 9.

Mr. Russell Sang, a handwriting and typewriting identification expert, testified for the Government that the handwriting on the back of each of the nine checks was the defendant's handwriting.

The defendant testified in her own behalf and denied that she ever had in her possession any of the nine checks which were put into evidence during the trial. She also

denied signing any of the endorsements on those checks or passing those checks to anyone for payment. Mrs. Samuel testified further that on the morning of Friday, February 16, 1973, she left Bridgeport with her family on a trip to Florida to attend a funeral service for a close relative. The funeral took place on Sunday, February 19, 1973 and she did not return to Bridgeport until Friday, February 23, 1973. She testified further that while in Florida, she had signed the guest book at the funeral home. This testimony related to Government Exhibit 8 which carried the date of February 20, 1973 stamped on the back of the check by the bank. According to the Manager of Mr. Jerry's Ltd., that check was probably cashed one day prior to its date of deposit.

Although several witnesses testified that they were present, requested and received identification at the time the checks were cashed, no witness identified Margaret Samuel as the individual who cashed the checks. Moreover, the teller at the Connecticut National Bank specifically failed to identify the woman claimed by the Government to be Mrs. Samuel in the bank surveillance photograph as the person who cashed Government Exhibit 9.

With respect to Government Exhibits 1-8, then, the Government's case against Margaret Samuel is based exclusively on the testimony of the handwriting expert that the signatures had been written in Mrs. Samuel's handwriting.

With respect to Government Exhibit 9, the Government's

case consists of the handwriting testimony, a thumbprint, and a bank surveillance photograph of someone who was in the bank at the time Government Exhibit 9 was passed and who the Government claims is the defendant.

Summary

The defendant respectfully submits the following arguments in her appeal from the jury's verdict of guilty after a three day trial below:

(1) The Government's evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

The scantiness of the Government's evidence in this case made unusual and, the defendant submits, constitutionally impermissible demands on the jury's powers of reason and logic. The jury's verdict in this case was premised on a series of inferences, all of which were unfavorable to the defendant.

The defendant contends first that, as a matter of law, guilt has not been established beyond a reasonable doubt when each of the central elements in the offense rests in its entirety upon inferential logic and circumstantial evidence.

The defendant's second contention is that, as a matter of law, guilt beyond a reasonable doubt has not been established when one of the central elements of the offense must be inferred from another of the central elements of the offenses which, in turn must be inferred from a third fact.

(2) The inferences forced the defendant to prove her innocence beyond a reasonable doubt, thus violating the defendant's right under the Fifth Amendment to due process of law.

The defendant submits that the combining and compiling

of inferences in this case unconstitutionally shifted the burden of proof from the Government onto the defendant, forcing her to prove her innocence beyond a reasonable doubt, thus violating the defendant's Fifth Amendment right to due process of law.

(3) The court's instruction which permitted the jury to draw an inference from "unexplained possession" of recently stolen property violated the defendant's Fifth Amendment right not to incriminate herself.

The defendant steadfastly and vehemently denied possession of the checks in this case. In order to rebut the court's instruction with respect to "unexplained possession" of recently stolen property, she would have been required to concede possession, one of the central elements of the offense, and then explain it.

Such a requirement, the defendant submits, violates her Fifth Amendment protection against self-incrimination.

(4) The District of Connecticut's Jury Selection Plan violates Title 28 of the United States Code, Sections 1861 and 1862.

The disparity in the percentages of Negroes on the jury lists and in the surrounding community violates the policy of the United States that all petit juries shall be selected from a fair cross section of the community.

2. The Government's evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

Before convicting Margaret Samuel of violating Title 18 United States Code, Section 1708, the Government had to prove each of three elements beyond a reasonable doubt: first, that the check was stolen from the United States mails; second, that the defendant unlawfully possessed the check; and third, that the defendant knew that the check had been stolen. Careful examination of the record in this case will reveal that there was very little direct evidence introduced by the Government to prove these three central elements.

For the jurors to conclude that Margaret Samuel was guilty of violating 18 U.S.C. §1708, it was necessary for them first to draw a series of inferences unfavorable to the defendant, and then to conclude further that those inferences established her guilt beyond a reasonable doubt. In fact, the Government's case was composed of substantially more inference than evidence.

- (a) Guilt has not been established beyond a reasonable doubt when each of the central elements in the offense rests in its entirety upon inferential logic and circumstantial evidence

The following inferences were at work in this case:

- (1) There is no direct evidence that the checks in this case were ever mailed, but the jury was permitted to draw

the inference that the internal procedures of the Connecticut State Department of Welfare resulted in the mailing of those nine checks.

(2) There is no direct evidence that the checks in this case were ever stolen from the mail, but the jury was permitted to draw the inference that the checks had been stolen from the testimony of the payees that they did not receive the checks and from the prior inferred fact of the checks having been mailed. Thus, the first element of the offense, that the checks were in fact stolen from the mail, is established on the basis of two inferences.

(3) There is no direct evidence that Mrs. Samuel ever possessed eight of the nine checks involved in this case, but the jury was permitted to infer from the fact that her handwriting supposedly appeared on the backs of those checks that she had, at least for the purposes of 18 U.S.C. §1708, "possessed" those checks. The second element of the offense is thus established, also on the basis of an inference.

(4) There is no direct evidence that Mrs. Samuel ever knew that those checks had been stolen, but the jury was permitted to infer her knowledge from the prior inferred fact of possession and from the additional fact that the checks were, with the notable exception of Exhibit 8, cashed on the same day as the date of issue. From the famed "possession of recently stolen property" inference, the jury was permitted to infer Mrs. Samuels' knowledge that the checks had been

stolen. This last element of the offenses, as with the first, is thus established on the basis of two inferences.

In Barnes v. United States, 412 U.S. 837 (1972), the Supreme Court upheld the constitutionality of the inference of guilty knowledge based on the unexplained possession of recently stolen property. The facts of Barnes, however, are significantly different from the facts in this case.

In Barnes, there was little dispute as to whether the defendant had in fact possessed checks stolen from the mail. Direct evidence was submitted in the Barnes trial which established, without the use of any inferential leaps of logic or circumstantial convolutions, that Barnes had full control and custody of the checks in issue. The evidence established, for example, that Barnes had opened a checking account and deposited the stolen checks in that account. Moreover, postal inspector testified that Barnes admitted to having the checks in his possession. Furthermore, Barnes admitted to the inspector that he signed the checks and deposited them in that checking account. All this evidence was submitted by the Government over and above testimony from a handwriting expert that the handwriting on the checks belonged to Barnes.

With the exception of Count Nine of the indictment, no such direct evidence exists as to the defendant's possession of the check. Unlike Barnes, each of the elements of the offenses set forth in Counts 1 through Count 8 in this

case requires the jury to rely upon an inference. Whereas in Barnes, the jury could rely on direct testimony and solid evidence as to the defendant's possession of checks stolen from the mail before inferring guilty knowledge, in Mrs. Samuel's case, the jury had to infer theft as well as possession as well as guilty knowledge.

In United States v. Hines, 256 F.2d 561, 564 (2d Cir. 1958) this Circuit held that a letter shown to have been "properly mailed and never received by the addressee, but found in quite improper and misusing hands, can be found to have been stolen from the mails in the absense of any other explanation being proffered." As with Barnes, the facts of Hines are considerably different from the facts here.

In Hines, the court found that the evidence showed that

"The check was deposited in the mails in an envelope properly addressed to the payee; he never received it or authorized anyone else to receive or cash it; and the defendant had possession and attempted to cash it using false identification and forged endorsement."

In Hines, there was apparently concrete evidence that the letter was properly addressed and mailed; in Mrs. Samuels' case, the jury was forced to infer the proper mailing of the welfare checks. In Hines, there was direct evidence that the checks were found in the possession of someone

other than the payee; in Mrs. Samuels' case the jury was forced to infer that Mrs. Samuel possessed the checks.

The court's attention is respectfully directed to Goodman v. United States, 341 F.2d 273 (1965 5th Cir.) and Allen v. United States, 387 F.2d 641 (5th Cir. 1968). In Goodman and Allen, the Fifth Circuit addressed the question basic to any charge brought under 18 U.S.C. §1708 of whether there was sufficient evidence to show that the checks had in fact been stolen from the mails. The court noted that 18 U.S.C. §1708 "is premised on protecting the mails and does not interdict theft after a letter or package has left the mails." In Goodman there was evidence to show that the defendant had received the check in his mail box by mistake, and the theft that occurred took place after the check had been removed and had left the mail. In Allen, however, the evidence was even less exculpatory, but the court found that, as in Goodman, there was insufficient evidence to show that the theft had taken place before removal from the mails.

"Mere possession at a later date where there is also proof of a misdirection of the check to the defendant as was this case, is consistent with innocence on the requisite element that the check was stolen from the mails. It is as reasonable to assume that the decision to steal

or convert the check took place at a time after it had left the mails. That it was stolen is not sufficient; the proof must show that it was stolen from the mails."

The defendant submits that here, as in Goodman and Allen, there was insufficient evidence to permit the jury to infer that the mail was stolen from the mail. On the contrary, the payees testified that none of their mail boxes had been rifled or tampered with in any way.

The defendant's claim here extends to all nine checks, but the argument is particularly irrefusable with respect to Government's Exhibit 7, the subject of Count 7 (App. p24) That check, addressed to Shirley Woods, at 555 Trumbull Avenue in Bridgeport, Connecticut, fails to carry Ms. Woods' building number or apartment number and thus bears a totally insufficient address to permit the jury to infer that the check was properly delivered to Ms. Woods mail box. As the testimony clearly indicates, 555 Trumbull Avenue is a large apartment complex containing at least eleven buildings each with sixty-four families. That totally inadequate address, places that check squarely within the facts and rulings of Allen v. United States, supra.

Hines validated the inference relating to theft from the mails, the first element which must be proven beyond a reasonable doubt to convict a defendant under 18 U.S.C. §1708; Barnes validated the inference relating to guilty knowledge, the third element of the offense which must be established beyond a reasonable doubt to convict a defendant of violating 18 U.S.C. §1708. In both

Hines and Barnes, however, those inferences stood alone, surrounded by direct testimony and concrete evidence. Unlike Hines and Barnes, in this case the inferences themselves are based on inferences. Perhaps more significantly, unlike the facts in Hines and Barnes, each of the three elements which must be proved beyond a reasonable doubt in order to convict a defendant of violating 18 U.S.C. §1708 is itself based upon an inference. The defendant submits that, as a matter of law, she cannot be found guilty of 18 U.S.C. §1708 when each and every one of the elements which must be proven beyond a reasonable doubt is based upon an inference.

- (b) Guilt has not been established beyond a reasonable doubt when one of the central elements of the offense must be inferred from other central elements of the offense which, in turn must be inferred from other facts.

The Court instructed the jury that, "If you find that the checks were properly addressed and placed in the mails and were not received by the addressee, you are entitled to conclude...that the checks were stolen from the mails by someone." (Tr. p. 197)

As to the second element of the offense, the Court instructed the jury that possession in this case meant "physical custody," and further that "if [the jury] found that the defendant wrote a forged endorsement on the back of the check, [it] would be entitled to conclude that she

had sufficient possession of the check to establish the possession required to satisfy the second element of the offense charged." (Tr. 198)

Finally, the Court instructed the jury that "In considering whether a person has knowledge that an item was stolen, you are entitled,...to draw an inference of such knowledge from the fact...that the person has possession of an item that had recently been stolen." As can be seen from the two prior instructions of the Court, this third element (knowing possession) rests on an inference which in turn rests on two additional inferences (theft from the mail and possession), which are themselves central elements of the offense and which in turn rely on facts which are in dispute.

The defendant submits that this chain of circumstantial and inferential proof, if permitted, will reduce the standard of "proof beyond a reasonable doubt" to a hollow and meaningless slogan.

In Tot v. United States, 319 U.S. 463, 467 (1943), the Supreme Court required a "rational connection between the fact proved and the ultimate fact presumed" for an inference to comply with due process standards. The inference, said the Court, cannot be "arbitrary."

In United States v. Gainey, 380 U.S. 63 (1965), the Supreme Court upheld the constitutionality of an instruction permitting the jury to infer from the defendant's unexplained presence at an illegal still that he was unlawfully "carrying on" the business of a distiller. The Court upheld that inference on the ground that "carrying on" was a comprehensive term. Since it was common knowledge that illegal stills were secluded, secret operations, it would be fair to infer that the defendant's unexplained presence at the still meant he was "carrying on".

In a virtually identical fact situation the Supreme Court limited Gainey in United States v. Romano, 382 U.S. 136 (1965). In Romano, the Government sought to go beyond "carrying on" and wanted to infer from the defendant's unexplained presence that the defendant was "in possession custody or control of the still." The Court held however that "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt - 'the inference of the one from proof of the other is arbitrary...[Citation omitted]'"

The defendant respectfully submits that as a matter of law and logic one inference per fact should be enough, that to permit a chain of inferences to hang from the single link of one sole fact would be "arbitrary" and would remove the "rational

connection between the fact proved and the ultimate fact presumed." See generally, In re Winship, 397 U.S. 358, 364 (1970); Leary v. United States, 395 U.S. 6 (1969); and the dissents by Justice Douglas, Brennan and Marshall in Barnes v. United States, 412 U.S. at 848, 852.

3. The inferences forced the defendant to prove her innocence beyond a reasonable doubt, thus violating the defendant's right under the Fifth Amendment to due process of law.
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Although Judge Newman carefully instructed the jury that they were not required to draw the inferences which were set forth so completely in his charge, the availability of those inferences to the jury in fact shifted the burden of proof from the Government to the defendant. With respect to each element of the offense stated in each of the nine counts, the defendant was placed in the position of having to introduce evidence refuting or explaining the fact upon which the inference was based.

The defendant respectfully submits that such a combining and compiling of inferences has the constitutionally impermissible result of shifting the burden of proof from the Government onto the defendant, thus forcing her to prove her innocence beyond a reasonable doubt, thus violating the defendant's Fifth Amendment right to due process of law.

For example, Judge Newman specifically instructed the members of the jury that they were permitted to infer that the checks had been stolen from the mail in spite of the fact the none of the mail boxes in the apartments had been broken into and in spite the fact that every one of the nine checks was cashed with identification that satisfied three different bank tellers. To counteract that inference

the defendant would have been forced to introduce evidence showing that welfare checks subject to the regular procedures of the Welfare Department are often not mailed or addressed properly, that mail delivered in the regular course of business is often not delivered properly, and that other individuals with access to the payees' mailboxes -- perhaps from the payees' families -- sometimes collected the mail. The defendant was thus put in the position of having to prove a negative. This burden, imposed on the defendant by virtue of inference alone, runs counter to fundamental constitutional principles of due process. It is the government which must prove guilt; not the defendant who must prove innocence.

4. The Court's instruction permitting the jury to draw an inference from "unexplained possession" of recently stolen property violated the defendant's Fifth Amendment right not to incriminate herself.

In Barnes v. United States supra, the Supreme Court specifically dealt with the privilege against self-incrimination invoked by the appellant in that case. But in Barnes, the defendant did not take the stand and the issue of self-incrimination was posed in the context of the defendant's right to remain silent.

Here, Mrs. Samuel took the stand and denied that she had ever possessed the checks, forged names on the checks, or cashed the checks.

For Mrs. Samuel to rebut the inference based on "unexplained possession" of recently stolen property, it

would have been necessary for her to concede possession of the checks in the first place and then to offer an explanation for the possession. At trial Mrs. Samuel was literally defenseless when it came to the third element of the offense, i.e. knowing possession; she could not defend against the inference without admitting to an essential element of the offense thereby incriminating herself.

The defendant, therefore submits that, where the issue of possession itself is in dispute, the Fifth Amendment requires that the jury should not be specifically instructed on the inference arising from "unexplained possession" of

the check. To do so places an unconstitutional burden upon the defendant; there is no way for the defendant to rebut or counteract or neutralize the extremely damaging inference of knowledge without waiving her Fifth Amendment right not to incriminate herself and admitting to the possession of the check.

The Fifth Amendment specifically states that "No person...shall be compelled in any criminal case to be a witness against himself..." To permit the jury to draw the unexplained-possession inference when possession itself is in dispute cannot be viewed in any way other than an attempt to compel the defendant to be a witness against himself.

5. The District of Connecticut's Jury Selection Plan violates Title 28 of the United States Code, Sections 1861 and 1862.

On September 5, 1974, Margaret Samuel moved to strike the jury panel and stay proceedings pending the issuance and compliance with an order to supplement the jury list with additional Negro veniremen.^{*/} On November 25, 1974, Judge Newman denied Margaret Samuels' motion, citing his ruling in United States v. Gonzalez, et al. Crim. No. B-115, (May 22, 1974) (app. p. 14).

The defendant respectfully appeals Judge Newman's ruling on the ground that, contrary to the Court's conclusion in its ruling of May 22, 1974, the evidence clearly establishes that those rights which are supposedly protected under 28 U.S.C. §§1861 through 1863 are as a matter of fact and law inadequately protected by the existing

^{*/} The grounds for Mrs. Samuels' motion were identical to those set forth by Louis Gonzalez in a similar motion in United States v. Gonzalez, supra. Mrs. Samuels also moved that the evidence submitted in behalf of the Gonzalez motion be incorporated by reference into her motion.

In Gonzales, Judge Newman denied the defendant's motion in a ruling issued on May 22, 1974. (See app. p. 14) Gonzalez subsequently pleaded guilty and Judge Newman's ruling was never appealed.

existing district plan for juror selection. (app. p.8)

This case differs significantly from United States v. Jenkins, ___ F.2d ___, slip op. 2702 (2d Cir., April 4, 1974) in ways which Judge Newman acknowledged in his ruling of May 22, 1974. The facts developed in support of this motion are considerably more favorable to the defendant than were the facts developed in support of the comparable motion in Jenkins.

It is important to note at the outset that the disparity between the percentage of Negroes appearing on jury lists (2.26 percent)^{*/} and the comparable percentage of Negroes in the adult population of the New Haven jury division (5.45 percent) has in fact increased. (In Jenkins, the evidence disclosed that Negroes comprised 3.3 percent of total number of veniremen appearing on any jury list.)

More significant, however, is the impact this increase in disparity has had on the statistical probability of any single jury venire having a black member. If the just list were accurately to reflect the surrounding com-

^{*/} The jury selection plan for the District of Connecticut calls for the veniremen for the panel (the jury list) randomly to be selected from the voting lists.

munity, a jury venire composed of sixty members would be completely white only 3.5 percent of the time. Moreover, there would be an 84.5 percent probability that any given venire would have two or more Negro members, a 64.1 percent probability that any venire would have three or more members, a 41.4 percent probability that any venire would have four or more members, a 22.8 percent probability that any venire would have five or more members, a 10.8 percent probability that any venire would have six or more members, and a 4.4 percent probability that any venire would have seven or more members who were Negroes. (app.p.16)

Under the existing plan, however, with only 2.26 percent of all members of the jury list being Negroes, the probabilities shift dramatically. Twenty-five percent of the time (25.4 percent) a jury venire of sixty members will have no Negro members. The further probability of any Negro juror being selected from any of those panels falling within the 25 percent is of course zero.

From the other perspective, the likelihood of any jury venire of sixty members having five or more Negro members is less than two in a hundred (1.5 percent). Given the further random selection of jurors from the venire itself in making up the proposed petit jury panel, the probability of a Negro appearing on the petit jury plummets to nil.

As Judge Newman recognized in his decision, a representative list would also produce five or more Negroes on a venire of sixty in 22.8 percent of the drawings while the actual list as it presently exists can be expected to produce five or more Negroes in only 1.5 percent of the drawings. (app.p.16)

The defendant submits simply that while Judge Newman appeared to understand clearly the statistical implications arising out of the disparities between the voting lists and the actual population, he erred in his conclusion that those disparities were not precluded and forbidden by Congress when it enacted Title 28, United States Code, §§1961-1963.

Congress' objectives in that legislation were set forth clearly in its Declaration of Policy.

It is the policy of the United States that all litigants in the Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community...

That plain and simple objective, the defendant respectfully submits, has not been fulfilled by this District's jury selection plan.

CONCLUSION

For all of the foregoing reasons, the defendant respectfully submits that the court erred in denying the defendant's motion for a judgment of acquittal. The defendant respectfully requests that the judgment of conviction be vacated and the case dismissed with prejudice.

Alternatively, the defendant respectfully submits that the court erred in denying the defendant's motion for a stay of proceedings, to strike the jury panel and to enter an order requiring an alternative method for selecting prospective petit jurors.

The defendant respectfully requests that the judgment of conviction should therefore be vacated and the case remanded for proceedings in accordance with the court's opinion.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1103

UNITED STATES OF AMERICA
APPELLEE

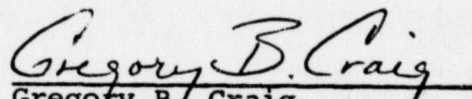
V.

MARGARET SAMUEL

DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief and
Appendix of the defendant-appellant in the above matter
was mailed postage pre-paid to Thomas F. Maxwell, Jr., Esq.
Assistant U.S. Attorney, Federal Building, 915 Lafayette
Boulevard, Bridgeport, Ct.


Gregory B. Craig
Federal Public Defender

